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9 UNITED STATES DISTRICT COURT

10 NORTHERN DISTRICT OF CALIFORNIA

11 CLIFFORD COOK,

12 Plaintiff,

13 vs.

14 CITY AND COUNTY OF SAN
FRANCISCO, ANTONIO FLORES,
15 DON SLOAN, MARSHA ASHE, and
DOES 1-50, inclusive,

16 Defendants.

17 Case No. C 07-02569 CRB

18 **SUPPLEMENT REPLY
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANTS' MOTION FOR
PARTIAL SUMMARY JUDGMENT;
AND OPPOSITION TO MOTION TO
CONTINUE**

19 Date: May 9, 2008
Time: 10:00 a.m.
Place: Courtroom 8, 19th Fl.

Date action filed: May 15, 2007
Trial date: None set

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INTRODUCTION

Three experienced police officers testified that Inspector Clifford Cook's apparent escalating pattern of domestic abuse motivated and justified Cook's arrest for domestic violence. Lacking any actual evidence upon which to rely to refute this evidence, Cook cites vaguely to "inherent racism" as the basis of his Equal Protection claim. Because Cook cannot show racial motivation for his arrest, the Court should grant defendants' motion for partial summary judgment.

The San Francisco Police Department arrested Cook based on probable cause that he committed acts of domestic violence against his wife. Cook sued the City and three members of the Department, claiming that they arrested him because of his race (African-American) and that of his wife (Caucasian). Even after conducting five depositions, including that of the officers involved in the arrest, however, no evidence supports Cook's claim. Rather, the evidence shows that Captain Marsha Ashe "had the legal and ethical responsibility to make an arrest in this case" and that "this case is predicated on physical evidence, escalating violence, as reported by the victim, and lethality factors, that suggested this could easily be a domestic violence homicide." (Ashe Depo. p. 126:7-22.) Inspector Antonio Flores, the lead investigator, believed that Inspector Cook should have been arrested because "it was getting a little worse" and the "totality of everything" justified an arrest. (Flores Depo. p. 32:25-34:22.)

In his complaint, Cook's only allegation supporting his claim of an equal protection violation was his unsupported belief that the Department decided to arrest him "after the District Attorney's Office decided not to prosecute." Depositions taken by Cook have proven that allegation to be false. All of the deponents testified that the DA did not make that determination, nor communicate any such determination, prior to Cook's arrest. (See, e.g., Flores Depo. p. 45:24-46:10; Aguilar Tarchi Depo. p 12:1-13:24.) Cook can therefore no longer rely on this allegation, but must present other facts to support his claims. He has failed to do so.

Because Cook has not presented any specific and substantial evidence demonstrating that Captain Ashe did not honestly believe that an arrest was appropriate in this case, the Court should grant summary adjudication to the City and the individual defendants.

STATEMENT OF FACTS

The Police Department received a report from Lisa Cook, Cook's wife, that Cook had thrown her down some stairs a week before. (Ex. 2 to Ashe Dec. filed Jan. 18, 2008.) Medical evidence corroborated her story. (*Id.*) When interviewed, Lisa Cook reiterated a long history of physical abuse, including a rape by her husband. (Exs. 1 and 2 to Ashe Dec.) She also indicated that he had issued threats in the past, stating that he could find her wherever she was, and that he could "plan the perfect murder." (*Id.*)

After interviewing Lisa Cook and obtaining additional evidence, the Police Department met to discuss the case and the next steps. (Ex. 1 to Ashe Dec.) At that meeting, Captain Marsha Ashe, the Captain in charge of the domestic violence unit, decided to conduct a custodial arrest of Inspector Cook. (Ashe Depo. p. 177:17-23.) She made this decision on a long list of "lethality factors." (Ashe Dec. ¶ 8.) She discussed, but rejected, the possibility of waiting to determine whether or not the DA would issue a warrant. (Ashe Depo. pp. 119:1-24; 179:14-180:2.) The Department also decided to seek a bail enhancement. Captain Ashe and Inspector Flores both testified that they believed these actions could create additional barriers to additional and possibly lethal violence on Inspector Cook's part. (Ashe Dec. ¶ 8, Flores Depo. p. p. 32:25-34:22.)

PROCEDURAL HISTORY

Cook sued the City and three individual defendants under Title VII, FEHA, and 42 U.S.C. § 1983. The claims against the individual defendants relate only to Cook's § 1983 cause of action for an Equal Protection violation. Defendants moved to dismiss that claim under Federal Rule of Civil Procedure 12(b), but the court indicated that it would prefer to hear the issue on summary judgment rather than allowing amendment of the complaint. The Court limited discovery to defendants' declarants, but indicated that if Cook believed additional discovery was necessary to oppose the motion, to bring a Rule 56(f) motion.

Defendants moved for summary judgment, submitting one declaration, from Captain Marsha Ashe. Cook deposed Captain Ashe. Cook then moved under Rule 56(f) for additional discovery, requesting the depositions of Lieutenant Donald Sloan, Inspector Flores, Captain Kevin Cashman,

1 and Assistant District Attorney Elizabeth Aguilar-Tarchi. The Court granted Cook's Rule 56(f)
 2 motion, and ordered post-discovery supplemental briefing on the summary judgment motion.

3 Cook took the allowed depositions. He then noticed two additional depositions. The City
 4 objected on the ground that these two additional depositions were not within the scope of the
 5 Court's order, and were not necessary to oppose defendant's motion.

6 Cook filed his supplement opposition, and again moved for a continuance under Rule 56(f).
 7 Cook did not, however, submit any declaration justifying the additional depositions that he has
 8 requested.

9 ARGUMENT

10 I. COOK FAILED TO PRESENT ANY EVIDENCE SHOWING DISCRIMINATORY PURPOSE FOR HIS SELECTIVE ENFORCEMENT CLAIM

11 The standard for selective enforcement cases differs from the standard for proving an
 12 employment discrimination case because of the considerable discretion officers making arrest
 13 decisions must exercise. As the Court stated in *Wayte v. United States*, 470 U.S. 598, 607-08
 14 (1985) cases challenging discretionary enforcement decisions are "particularly ill-suited to judicial
 15 review." (*Id.*) "Such factors as the strength of the case, the prosecution's general deterrence value,
 16 the Government's enforcement priorities, and the case's relationship to the Government's overall
 17 enforcement plan are not readily susceptible to the kind of analysis the courts are competent to
 18 undertake." (*Id.*)

19 And, "'the conscious exercise of some selectivity in enforcement is not in itself a federal
 20 constitutional violation' so long as the selection was [not] deliberately based upon an unjustifiable
 21 standard such as race, religion, or other arbitrary classification." *Bordenkircher v. Hayes*, 434 U.S.
 22 357, 364 (1977) (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)). Thus, only when "the
 23 decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,'
 24 not merely 'in spite of,' its adverse effects upon an identifiable group" can a plaintiff prevail in a
 25 selective enforcement case.

26 Under these standards, Cook cannot prevail because he cannot show that Captain Ashe, the
 27 decision maker here, deliberated acted out of racial animus. He has provided no evidence that
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1 Cook's race or that of his wife in any way motivated Captain Ashe's, or anyone else's actions. As
2 further reiterated below, Captain Ashe fully explained her motivation. She decided to arrest Cook
3 on the specific facts of the case, which to her indicated not only probable cause, but also Cook's
4 potential for further violence. In response, all Cook cites to is "inherent racism." But he cites to no
5 actual facts to support an inference of deliberate discrimination. He therefore has failed to carry his
6 burden to avoid summary judgment on this claim.

7 **II. EVEN APPLYING EMPLOYMENT DISCRIMINATION STANDARDS, COOK
8 CANNOT PREVAIL**

9 Without indicating why he believes these cases to be inapplicable to his claim, Cook cites to
10 employment cases. Even if the Court were to apply employment discrimination cases here,
11 however, defendants have met their burden for summary judgment.

12 Here, Cook fails to present any evidence of racial motivation. Even if he did, defendants
13 presented legitimate, non-discriminatory reasons for arresting Cook. They had probable cause.
14 They believed that the pattern of behavior elicited during the investigation showed Cook's
15 potentially escalating level of abuse towards his wife. As Captain Ashe stated, she believed that
16 certain "lethality factors" suggested that arresting Cook was the best course of action.

17 Because defendants have articulated a legitimate reason for Cook's termination, Cook must
18 "offer specific and significantly probative evidence that the employer's alleged purpose [was] a
19 pretext for discrimination" to withstand the motion for summary judgment. *Schuler v. Chronicle*
20 *Broadcasting Co.*, 793 F.2d 1010, 1011 (9th Cir. 1986); see also *Gay v. Waiters' and Diary*
21 *Lunchmen's Union*, 694 F.2d 531, 546 (9th Cir. 1982) (plaintiff must provide evidence "from which
22 one can infer, if such actions remain unexplained, that it is more likely than not" that the defendant's
23 conduct was racially motivated). Cook can prove pretext "(1) indirectly, by showing that the
24 employer's proffered explanation is 'unworthy of credence' because it is internally inconsistent or
25 otherwise not believable, or (2) directly, by showing that unlawful discrimination more likely
26 motivated the employer." *Raad v. Fairbanks North Star Borough School Dist.*, 323 F.3d 1185,
27 1194 (9th Cir. 2003) (quotation omitted). He has done neither.

1 Cook offers no direct evidence of improper motive – such as racist or otherwise
 2 discriminatory statements or actions – and therefore, to survive summary judgment he must come
 3 forward with circumstantial evidence that tends to show that defendants' proffered motives were not
 4 the actual motives because they are inconsistent or otherwise not believable. Such evidence of
 5 "pretense" must be "specific" and "substantial" in order to create a triable issue with respect to
 6 whether the defendants intended to discriminate on an unlawful basis. *Godwin v. Hunt Wesson,*
 7 *Inc.*, 150 F.3d 1217, 1222 (9th Cir. 1998).

8 For purposes of proving pretext, the pertinent question is not whether there is conflicting
 9 evidence on Cook's escalating level of violence, but whether there is a triable issue with respect to
 10 whether defendants "honestly believed its reason for its actions, even if its reason [was] foolish or
 11 trivial or even baseless." *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1063 (9th Cir. 2002);
 12 see also *Cotran v. Rollins Hudig Hall Int'l, Inc.* 17 Cal.4th 93, 107 (1998). That is to say, to survive
 13 summary judgment, Cook must proffer specific and substantial evidence demonstrating that
 14 defendants did not honestly believe that Cook was capable of escalating abuse. All Cook says is
 15 that he was arrested because of "inherent racism."

16 Cook fails to provide any evidence that Captain Ashe's legitimate bases for arresting him are
 17 false, or that race motivated any of her decisions. Therefore, he cannot prevail on his claim.

18 III. COOK MAKES CONCLUSIONS UNSUPPORTED BY THE EVIDENCE

19 Cook makes many arguments in an attempt to bolster his claim. Many of his arguments are
 20 based on a misstatement of defendants' testimony, or fails to include the deponent's explanations for
 21 their statements. Although defendants do not believe that if true these allegations preclude
 22 summary judgment, defendants explain plaintiff's factual misstatements below.

23 1. The Investigation Contained Evidence of Prior Threats and Violence 24 Perpetrated by Inspector Cook

25 On Page 4 of his supplemental opposition, Cook asserts that "Lisa Cook never reported any
 26 threats. . . . There was no history of physical violence." In fact, although Lisa Cook stated that
 27 Inspector Cook made no threats on July 19, 2005, the date of the incident that led to Cook's arrest,
 28 in the statement she gave the night before Cook's arrest she recounted a history of violence and

1 threats. She reported that Cook raped her, beat her, said he could find her where she was (which he
 2 proved when he misused his police authority to run a computer search regarding her); and that he
 3 could plan the "perfect murder." (Exs. 1 and 2 to Ashe Dec.)

4 Thus, Cook's statement is false. Lisa Cook did report threats and a history of physical
 5 violence.

6 **2. Obtaining a Warrant Prior to An Arrest is Not "Custom and Practice."**

7 On page 7 of his Supplemental Opposition, Cook states that it is "custom and practice" to
 8 obtain a warrant before making an arrest, citing to Inspector Flores' testimony. But Inspector Flores
 9 never testified that it was the Department's custom and practice to obtain a warrant prior to arresting
 10 a domestic violence suspect. Rather, he stated that the most common scenario is to arrest the
 11 suspect at the scene (without a warrant), which occurs in about 75% of the cases. (Flores Depo. p.
 12 14:10-16.) When a victim delays reporting domestic violence, such as here, "sometimes, if the
 13 person is gone, it may be that there is a likelihood, after looking at the case in a whole, you can say,
 14 'we need to find this person, and we need to go get them right now. . . . And so, you may just go out,
 15 without presenting the case to the DA, and that person is arrested, based on the information that the
 16 officers have." (Flores Depo. p. 17:9-18:10.) That is what occurred here. Lt. Sloan corroborated
 17 Flores' testimony. When asked whether it was "normal policy and practice" to wait until the District
 18 Attorney was ready to go to warrant before making an arrest, he said "not always." (Sloan Depo. p.
 19 42:11-14.)

20 Moreover, when Flores was questioned as to why he sometimes tries to get a warrant, Flores
 21 stated "in case the individual might have left town. They might have gone; they might have gone
 22 someplace else. There are several factors of why." (Flores Depo. p. 18:25-19:4.) Here, Cook had
 23 not gone anywhere, and the Police Department could find him and arrest him without a warrant.

24 Cook also cites to Inspector Flores' testimony that when a victim comes in off the street, that
 25 Inspector Flores will tell the victim that "it is up to the DA's office to go forward with the case."
 26 That is simply a statement of fact. Only the DA's office can prosecute. Moreover, Inspector Flores
 27 went on to explain why he makes this statement to the victims. He stated: "there are some victims
 28 out there that feel that - - that they still have this relationship, and it has to do with love. And within

1 this loving relationship that they have, they don't want to be the bad person. And sometimes they
 2 feel that, if they ever go back to the relationship, they can say 'you know, it wasn't be that was
 3 pressing charges against you. It was the State or the police of whoever.'" (Flores Depo. p. 24:14-
 4 26:13.) Flores never said that he tells victims that he will seek a warrant from the DA. Rather, he
 5 makes this statement as a means to get the victim to cooperate.

6 Flores *never* testified that it is the custom and practice to obtain a warrant in this situation.
 7 As Flores stated "I don't think [Cook's] case is different from other cases. I mean, if you took
 8 minus him being a police officer, there is several incidences where someone has been arrested later
 9 on, after the fact the incident has occurred." (Flores Depo. p. 98:12-17.)

10 **3. Captain Cashman and Inspector Flores Did Not Deny That Captain
 Ashe Decided to Arrest Cook at the Morning Meeting**

11 On page 6 of his Supplement Opposition, Cook states that Captain Kevin Cashman and
 12 Inspector Antonio Flores "denied that a decision to arrest Cook was made at [the July 27, 2005
 13 morning] meeting." This is an incorrect reading of the testimony. Captain Cashman testified "only
 14 that I know a decision was made prior to the arrest. Whether it was at that meeting, I couldn't
 15 definitely say it was at that meeting . . . I can't recall specifically that that was said at that meeting."
 16 (Cashman Depo. p. 19:13-20.) Inspector Flores testified that he did not recall whether or not any
 17 decision was made at that meeting. (Flores Depo. p. 40:15-18.)

18 **4. Flores Thought A Bail Enhancement Unnecessary Because Serious
 Nature of Charges Would Raise Bail Amount**

20 Cook states that Flores did not believe that a bail enhancement was warranted in this case.
 21 Although Flores did make that statement Flores went on to state that the reason he did not believe a
 22 bail enhancement was warranted was because he believed that the charges would be so serious that
 23 the bail would be set high automatically. (Flores Depo. p. 44:13-20.)

24 **5. Flores Believed that Even Though it Might Interfere With His
 Investigation, Arresting Cook was A Good Idea**

25 Cook states on page 6 of his Supplemental opposition that Flores stated that arresting Cook
 26 was a "bad idea" because it "compromised" his investigation. These statements accurately reflect
 27 Flores' words, but not the totality of his testimony. Flores testimony was limited to the effect of the
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1 arrest on his investigation, and did not address the greater public safety issues. (Flores Depo. "Q:
 2 So, as an Investigator, arresting him was a bad idea, wasn't it, from just the investigation point of
 3 view, of compromising your investigation? A: Yes.") When specifically asked whether the
 4 Department should have arrested Cook, Flores answered "yes." (Flores Dep. p. 32:25-33:12. "Q:
 5 Yeah. I'm trying to find out if you believe that Mr. Cook should have been arrested before the DA
 6 did a warrant review because of these escalating factors you've mentioned? A: Yes.")

7 Moreover, Cook implies that because Flores stated that Cook's arrest put him in a
 8 "predicament," that implies that Flores believed that the arrest was somehow wrong or
 9 inappropriate. But Flores' testimony makes clear that the "predicament" was merely an
 10 administrative one because he then had to complete lots of paperwork in a short period of time, not
 11 a legally questionable one. (See Flores pg. 44:15 ("We are now in a predicament, that now we have
 12 to gather all our documents; we have a police report to write; we have a bail enhancement to do; we
 13 have to get enough information documented on the Chronological Investigation Report. So it
 14 means we're going fast.))

15 Investigators always must balance the desire for additional evidence with protecting public
 16 safety by making an early arrest. Here, despite the effect on his investigation, Flores believed that
 17 the circumstances justified Cook's arrest.

18 **6. Cook Did Not Ask to Be Interviewed Prior to His Arrest**

19 Cook again argues that the Department's failure to interview him "before he was arrested" is
 20 evidence of "malice and oppression and circumstantial evidence of discrimination." But Cook's
 21 request to give a statement occurred when he was already under arrest. (Sloan Depo. p. 95:4-25.)

22 In its initial reply brief, defendants pointed out Cook's error. However, Cook has never
 23 addressed defendants' arguments on this matter. He continues to assert that he demanded to give a
 24 statement prior to his arrest, even though all of the evidence shows that when he made the request,
 25 he already was under arrest.

26 Additionally, Captain Ashe and Lieutenant Sloan testified as to their reasons for refusing to
 27 grant Cook's request for an interview. At that time, Cook did not have an attorney present. They
 28 believed that it was in Cook's best interest to wait until he had an opportunity to consult with an

1 attorney before making a statement. (See Sloan Depo. p. 101:14-20.) Cook lacks any evidence to
 2 suggest that this was not the true motivation. Moreover, it is difficult to determine in this case how
 3 refusing to allow Cook to give a statement caused him any harm.

4 **IV. NO FINAL POLICY MAKER RATIFIED ANY DISCRIMINATORY CONDUCT
 AND THEREFORE COOK'S MONELL CLAIM FAILS**

5 Cook failed to address the City's *Monell* claim. *Monell v. Department of Social Services*,
 6 436 U.S. 658 (1978) For the reasons set forth in the City's opening and reply papers, the court
 7 should grant the City's motion for summary judgment on Cook's *Monell* claim.

8 **V. COOK FAILED TO MAKE A SUFFICIENT SHOWING FOR FURTHER
 DISCOVERY UNDER FEDERAL RULE OF CIVIL PROCEDURE 56(F)**

9 In addition to providing argument in opposition to the City's motion, Cook also requests a
 10 continuance under Federal Rule of Civil Procedure 56(f) to obtain additional discovery. The party
 11 seeking additional time to develop its opposition bears the burden of showing that such relief is
 12 warranted. See *United States Investment Co. of Los Angeles, Inc. v. GTE Mobilnet, Inc.*, 281 F.3d
 13 929, 939 (9th Cir. 2002). Moreover, the moving party must proffer facts showing "that the
 14 information sought actually exists." *Employers Teamsters Local Nos. 175 and 505 Pension Trust*
 15 *Fund v. The Clorox Company*, 353 F.3d 1125, 1129 (9th Cir. 2004)

16 Here, Cook failed to submit any affidavit indicating why he believes that the testimony of
 17 the additional two witnesses he wishes to depose are essential to his opposition in this case. It is
 18 not. Inspector Donald Ciardella's only involvement was attending the meeting with the District
 19 Attorney, which Cook has had the opportunity to thoroughly explore in the depositions of Flores
 20 and Assistant District Attorney Elizabeth Aguilar-Tarchi. Captain Leroy Lindo was not involved in
 21 this investigation or the decision to arrest Cook. Thus, the court should deny the motion to
 22 continue, and grant partial summary judgment to defendants.

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CONCLUSION

For the foregoing reasons, the Court should grant the City's motion for partial summary judgment on Cook's Second Cause of Action.

Dated: April 25, 2008

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